

Local 3, International Brotherhood of Electrical Workers, AFL-CIO and Telecom Equipment Corp. of New York, Inc. Case 29-CD-305

May 2, 1983

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Telecom Equipment Corp. of New York, Inc., hereafter called Telecom, alleging that Local 3, International Brotherhood of Electrical Workers, AFL-CIO, hereafter called Local 3, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Telecom to assign certain work to employees it represented rather than to the unrepresented employees of Central Communications Purchasing Corp., hereafter called CCPC.

Pursuant to notice, a hearing was held before Hearing Officer William Shuzman on November 29, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Local 3 and Telecom filed briefs and Local 3 filed a motion for leave to file a reply memorandum to that part of Telecom's brief which requested that the Board's award in this case encompass the entire geographical area in which Telecom does business and Local 3 has jurisdiction.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties were unable to reach a stipulation as to whether Telecom was engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is undisputed that, prior to July 1982,²

the Parent of the Employer herein operated several subsidiaries and that both the Parent and its subsidiaries were involved in the business of purchasing, selling, and installing private telephone systems. All of the Parent's operations, including its purchasing, sales, and installation operations, were carried out from its Long Island City, New York, facility. In July, a corporate reorganization was instituted whereby two fundamental changes took place. First, within the Long Island facility, the Parent relinquished all sales and installation functions to Telecom, the wholly owned subsidiary established for this purpose. Although the Parent and Telecom operate from the same facility, the Parent now acts, and from the date of the reorganization has acted, solely as a holding company for all subsidiaries. The second fundamental aspect of the reorganization was that purchasing operations at all subsidiaries ceased and CCPC was established in Linden, New Jersey, as a wholly owned subsidiary of the Parent, to perform centralized purchasing for the subsidiaries, including Telecom.

Telecom is a New York corporation with its principal office and place of business in Long Island City, New York, where it is engaged in the distribution and installation of telecommunications equipment and related products throughout the New York City metropolitan area. Based on a projection of Telecom's operations since it commenced operations on July 1, it will annually purchase and receive, in the course and conduct of its operations, telecommunications equipment and related products valued in excess of \$50,000 directly from points outside the State of New York.

CCPC is a New Jersey corporation with its principal office and place of business in Linden, New Jersey, where it is engaged in the purchase of telecommunications equipment and related products for all the Parent's subsidiaries and in the distribution of said equipment to the subsidiaries in the New York City metropolitan area. Based upon a projection of its operations since it commenced operations on July 1, CCPC, in the course and conduct of its business, will annually receive at its Linden, New Jersey, facility telecommunications equipment and related products valued in excess of \$50,000 directly from points outside the State of New Jersey.³

Based upon the foregoing, we find that Telecom and CCPC are employers within the meaning of Section 2(2) of the Act and are engaged in commerce within the meaning of Section 2(6) and (7)

¹ In view of our rejection of Telecom's request *infra*, Local 3's motion is hereby denied.

² Unless otherwise indicated, all dates refer to 1982.

³ The record indicates, and we find it significant for purposes of establishing jurisdiction, that the Parent was, prior to July, and is now, a New York corporation which annually received goods and equipment valued in excess of \$50,000 directly from points outside the State of New York.

of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Local 3, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Telecom, the Employer herein, is engaged in the business of selling and installing private telephone systems. Prior to its corporate reorganization, the Parent's employees included warehousemen, expeditors, and a driver. All these employees were represented by Local 3. The warehousemen loaded and unloaded trucks, the driver acted as a general messenger and regularly picked up merchandise from one of the Parent's vendors, and the expeditors delivered equipment to jobsites throughout the New York City metropolitan area. Following the reorganization, these employees commenced working for Telecom. Telecom has abided by the terms and conditions contained in the collective-bargaining agreements formerly covering the Parent, and has, in fact, renegotiated the agreement covering warehousemen. The expeditors' and warehousemen's duties remain the same as before the reorganization. The sole driver was promoted to expeditor and the driver position remains vacant.

Prior to July, vendors doing business with the Parent either made their own deliveries to the Long Island City facility or did so via common carrier. With the establishment of CCPC and the attendant centralization of purchasing operations, vendors began making all deliveries to CCPC in Linden, New Jersey. CCPC employs warehousemen/expeditors who help unload incoming vendors' trucks, warehouse the equipment, and later deliver this equipment to the Parent's subsidiaries, including Telecom. CCPC's employees are unrepresented. In August, Telecom employees represented by Local 3 began refusing shipments originating from CCPC's facility.

On August 18, the occasion of the first refusal, a CCPC driver attempted to deliver plywood to the Telecom facility. When Kevin Dempsey, a Telecom foreman and member of Local 3, refused to accept the delivery, the driver unloaded it himself and returned to CCPC. According to George Kavoures, the general manager of CCPC, Dempsey explained he was not required to accept nonunion deliveries.⁴

⁴ Dempsey did not testify at the instant hearing.

On September 16, Frank Santinello, an employee of Telecom and Local 3's shop steward, joined his coworkers in their refusal to accept another CCPC delivery. According to Kavoures and Donald Gillespie, Telecom's vice president of operations, Santinello told them he was following Local 3's instructions to accept only deliveries made by Local 3 expeditors. Santinello denied receiving any such instructions from the Union and further denied making any such statement to Gillespie and Kavoures.

The record reveals that, on September 21, Santinello again refused a CCPC-originated delivery. On this occasion the attempted delivery was made via a common carrier driven by a member of a Teamsters local. On or about September 21,⁵ Gerald Walsh, president of the Parent, telephoned Dennis McSpedon, the business agent for Local 3, to inquire about the work stoppages. According to Walsh, McSpedon said the employees were within their rights to refuse deliveries of nonunion operations. McSpedon, however, testified that he assured Walsh that all deliveries would be accepted and that he instructed Santinello accordingly. McSpedon also testified that he knew nothing of the work stoppages until his telephone conversation with Walsh. Thereafter, on September 24, McSpedon met with Walsh to conclude negotiations on the warehousemen's contract. At the close of negotiations, the conversation turned to the subject of the work stoppages. Walsh testified that, when he informed McSpedon that the employees persisted in their refusals to unload deliveries from CCPC, the latter stated the "problem" could be resolved if Telecom used Local 3 expeditors to perform the CCPC delivery work. According to McSpedon, he again told Walsh that the deliveries would be accepted and, later, privately "bawled out" Santinello about the refusals.

Yet another work stoppage occurred on October 4, when Telecom employees turned away a delivery by a CCPC driver. As with the goods and equipment refused in the September incidents, the cargo was returned to the CCPC facility in Linden. On October 5, Telecom filed the instant 8(b)(4)(i) and (ii)(D) charges against Local 3.

B. *The Disputed Work*

The work in dispute relates to the delivery of equipment by truck from CCPC's warehouse in Linden, New Jersey, to Telecom's facility in Long Island City, New York, a distance of 26 miles.

⁵ While Walsh testified that he phoned McSpedon on September 21, McSpedon testified that their conversation took place earlier, "in the middle of September."

C. The Contentions of the Parties

Local 3 contends that National Labor Relations Board has no jurisdiction over the work dispute because this matter is covered by a grievance and arbitration provision in the collective-bargaining agreement between it and Telecom. Local 3 further contends that there is no reasonable cause to believe it violated Section 8(b)(4)(D) of the Act inasmuch as it did not cause the refusals to perform the work and its business agent did everything in his power to resolve the dispute.

Telecom contends that, because CCPC is not a party to the applicable collective-bargaining agreement, the arbitration clause contained therein is not an agreed-upon method for resolving the work dispute and that reasonable cause exists to believe the Act has been violated. It further asserts that CCPC has assigned the work to its employees, that this is the most efficient means of performing the work, and that the assignment is consistent with industry practice.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

On August 18, Kevin Dempsey, a former shop steward, refused to unload the plywood delivery made by CCPC. Thereafter, on September 16 and 21 and on October 4, Local 3's shop steward, Frank Santinello, refused to unload CCPC deliveries, despite being aware of the no-strike clause in the collective-bargaining agreement with the Employer.

Officers of Telecom, CCPC, and the Parent testified that Santinello told them that employees were following Local 3's instructions in refusing to accept the CCPC-originated deliveries, and also that McSpedon specifically claimed the work in dispute for Local 3 expeditors. In contrast, McSpedon and Santinello testified that they never uttered any such claims or statements. Santinello attributed the refusals to the warehousemen's fear that Telecom planned to phase out their positions and duties.⁶ A conflict in testimony does not preclude the Board from proceeding under Section 10(k), for, under this section, we are not charged with finding that a violation occurred, but rather with determining that reasonable cause exists for finding

⁶ Ostensibly this fear was borne of the relatively short lifespan of the newly agreed-upon collective-bargaining agreement covering warehousemen.

such violation.⁷ Accordingly, without ruling on the credibility of the testimony at issue, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. In reaching this determination, we note that only CCPC cargos were refused and that neither McSpedon nor Santinello confronted Telecom about its suspected desire to eliminate warehousemen. None of the employees who participated in the work stoppages, including Santinello, mentioned their purported anxiety over possible job losses when questioned about the refusals by Telecom and CCPC officers. Additionally, we note that Telecom's stated concern with a uniform termination of the collective-bargaining agreements to which it is a party is at least as plausible an explanation as that set forth by Local 3 for the term of the newly executed warehousemen's contract.

With respect to Local 3's contention that the contractual grievance and arbitration procedure is a voluntary method of resolving this dispute which renders the statute inapplicable, we note that CCPC is not a party to the collective-bargaining agreement between Telecom and Local 3, and is thereby not bound by it. Inasmuch as there is no agreed-upon method for the voluntary adjustment of the dispute to which all the parties herein are bound, we find that the dispute is properly before the Board for a determination under Section 10(k) of the Act.⁸

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to relevant factors.⁹ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.¹⁰

1. Certification and collective-bargaining agreements

There are no orders or certifications of the Board awarding jurisdiction of the work in dispute to employees represented by Local 3 or to any other labor organization. The collective-bargaining agreement between Telecom and Local 3 neither claims nor rejects the work in dispute, and, in fact, makes no mention of the type of work performed

⁷ See *Local 1294, Longshoremen's (Cibro Petroleum)*, 257 NLRB 403 (1981), and *Bricklayers Union 44 (Corbetta Construction)*, 253 NLRB 131 (1980).

⁸ *Local 85, Teamsters (Emery Air Freight Corporation)*, 262 NLRB 618 (1982).

⁹ *NLRB v. Radio & Television Broadcast Engineers, Local 1212, IBEW [Columbia Broadcasting]*, 364 U.S. 573 (1961).

¹⁰ *Machinists, Lodge 1743 (Jones Construction)*, 135 NLRB 1402 (1962).

by expeditors. Accordingly, we find that the collective-bargaining agreement does not favor an award to either group of employees.

2. Employer's past practice

Telecom was nonexistent before July, and therefore cannot be said to have a past practice. The record reveals that as employees of the Parent prior to July, the expeditors did not pick up merchandise and equipment from vendors; rather, the vendors themselves arranged for and made deliveries. In view of the fact that the disputed work did not exist prior to July, we find that this factor does not favor an award to either group of employees.

3. Relative skills

Both the CCPC deliverymen and Telecom's expeditors use vans and large trucks to carry out their respective responsibilities. The record reveals that no special skills are required, and that possession of a "Class 3" driver's permit is all that is needed to operate the vehicles used by the companies. Therefore, we find that the factor of relative skills is not helpful in resolving the instant dispute.

4. Area and industry practice

The record reveals that the subsidiaries of all other companies engaged in the sale and installation of telephone systems in the New York area, with the exception of the New York Telephone Company, have their own purchasing departments, and that it is their practice to have vendors deliver to the individual subsidiaries. Given the uniqueness of centralized purchasing in the pertinent geographical area, the factor of area and industry practice does not favor an award to either group of employees.

5. Economy and efficiency of operations

The record indicates that CCPC's Linden facility and Telecom's Long Island City facility are 26 miles apart, and that CCPC regularly makes deliveries to other employers in New York when it makes deliveries to Telecom. The cost of delivery is included in the purchase price Telecom pays when it buys goods from CCPC. On this basis, Telecom argues that sending its expeditors to CCPC's warehouse to pick up new equipment would not only have the effect of causing it to pay twice for deliveries, but would also consume more fuel and time than expended under the present system. We find, therefore, that the factors of economy and efficiency of operations favor awarding the work in dispute to CCPC employees.

6. Employer's preference

The record reveals that Telecom is satisfied with its contract with CCPC for purchases and deliveries and with the performance of CCPC employees pursuant to that contract. For reasons of economic and operational efficiency, Telecom prefers that CCPC employees continue performing the work heretofore assigned to them. Thus, the factor of the Employer's preference favors an award of the work in dispute to the employees of CCPC.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that unrepresented employees employed by CCPC are entitled to perform the work in dispute. We reach this decision relying on the factors of economy and efficiency of operations and employer preference.

Scope of the Determination

The Board will issue an award broad enough to encompass the geographical area in which an employer does business and in which the jurisdictions of competing unions coincide where a union demonstrates a proclivity to engage in unlawful conduct and where the dispute regarding an employer's work is likely to recur.¹¹ In this connection, we note that while Local 3 is no stranger to Board proceedings, it has never before sought an assignment of work of the nature of that disputed herein. Also, Local 3 has not in the past engaged in unlawful conduct with respect to Telecom or CCPC. Based on the foregoing, we find little likelihood that Local 3 will employ unlawful means to obtain similar work in the future should such work become available, and we decline to issue a broad award. Accordingly, the present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Unrepresented employees employed by Central Communications Purchasing Corp. are entitled to perform the work in dispute which consists of the delivery of goods and equipment from the CCPC facility in Linden, New Jersey, to the Tele-

¹¹ *Local 3, IBEW (General Dynamics)*, 264 NLRB 222 (1982).

com Equipment Corp. of New York, Inc., facility at Long Island City, New York.

2. Local 3, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Telecom Equipment Corp. of New York, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 3, International Brotherhood of Electrical Workers, AFL-CIO, shall notify the Regional Director for Region 29, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.